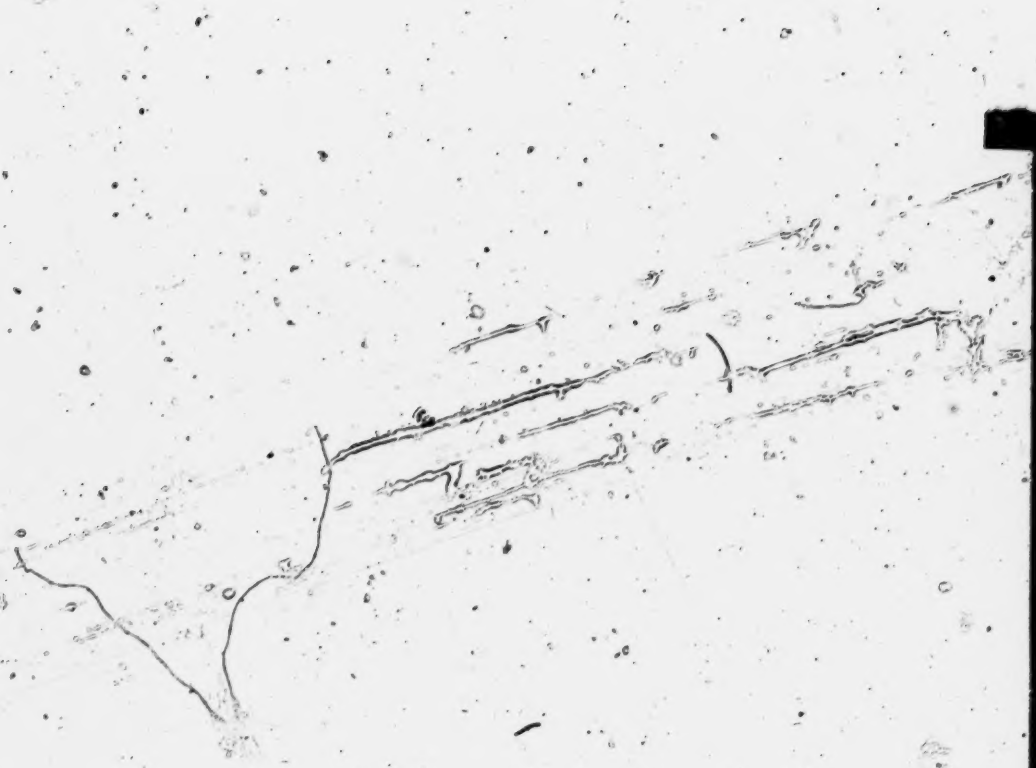

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In the Supreme Court of the United States

OCTOBER TERM 1939

No. 587

UNITED STATES OF AMERICA,
Petitioner,

vs.

CITY AND COUNTY OF SAN FRANCISCO,
a Municipal Corporation,
Respondent.

RESPONDENT'S PETITION FOR REHEARING, OR IN THE ALTERNATIVE, FOR CERTAIN CHANGES IN THE OPINION; ALSO MOTION FOR STAY OF MANDATE.

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CITY AND COUNTY OF SAN FRANCISCO,
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RESPONDENT'S PETITION FOR REHEARING, OR IN THE ALTERNATIVE, FOR CERTAIN CHANGES IN THE OPINION; ALSO MOTION FOR STAY OF MANDATE.

The Respondent, The City and County of San Francisco, a Municipal Corporation, petitions the Court for a Rehearing, or in the alternative, for certain changes in the Opinion; also for a stay of the Mandate.

PREFATORY STATEMENT.

It is important for the City to know precisely what it may not do under Section 6 of the Raker Act as now definitively interpreted, and precisely what it is free to do.

It is not necessary to say that the City has been relying on the revenue from its electric energy through the past

fifteen fiscal years and that it cannot longer do so until it is in a position to meet the requirements of Section 6 as interpreted by this Court, which will necessarily involve considerable time; and in the interim, close down its power houses, waste its potential energy and carry its water around the power plants at a cost of between two and three hundred thousand dollars unless the injunction is suspended by the District Court. Indeed, it will be forced to provide at the beginning of its fiscal year, July 1st, for other revenue unless the District Court should suspend the injunction during the forthcoming fiscal year, before the beginning of that year. It is therefore important that there be no ground for dispute as to the meaning of the Court's decision.

It is clear that in the circumstance the City is under requirement to make heavy capital expenditures but it would be unfortunate if any of the expenditures were made in the belief that they were required and it should later turn out that they were avoidable.

The prohibition of Section 6, so we submit, has been turned into a mandate (Opinion, p. 2, line 34; p. 3, lines 6-7); and the mandate is broader in instances than the prohibition. Of these, we presently take one: the matter of "distribution". The mandate requires "municipal performance of . . . distribution". (Opinion, p. 4, lines 14-16; see, also p. 8, lines 21 and 24; p. 3, line 9, p. 6, line 27.)

We submit this would be "not a construction of a statute but in effect an enlargement of it by the Court" which "transcends the judicial function", to use the language of Mr. Justice Brandeis, speaking for a unanimous Court in *Wallace v. Cutten*, 298 U.S. 229, 237 (Br.

Res. pp. 91-92); and is contrary to the position taken by the Government in the Circuit Court of Appeals where it said "The Government has never argued 'that section 6 requires public distribution of the energy, meaning thereby without the intervention of an agent' **and there is nothing in the decree [R. 168] which requires that the City make distribution without an agent.** . . . and the Government has never contended to the contrary" (Govt. Supp. Br. CCA, p. 8, quoted in Br. Res. p. 81); and it is likewise contrary to the concessions in the Petition for Certiorari, page 7, footnote 5, last line, and to the following from the Brief for the United States, page 12, where it is said: "While **the Government does not take the position that the statute inhibits the employment of the Company as a carrier for the transmission of power generated by the City, provided the sales are made by the City, it does contend" etc.** (Br. Res. p. 82.)

This position was confirmed by the Government after the opinion herein had been delivered, according to a Washington, D. C. dispatch of the Associated Press, dated April 22, 1940, reading as follows:

> "Government attorneys said the decision would permit San Francisco to acquire a municipal distribution system or arrange with a private power company for the distribution of the energy without any control over the energy being invested in the private company."

But, in a letter dated Washington, D.C., May 6, 1940, The Secretary of the Interior wrote The Mayor of San Francisco: "It is the view of this Department that Section 6 of the Raker Act, as construed by the Supreme Court

. . . only permits of municipal distribution of such energy".

Thus the Secretary would have Section 6 read as follows:

> "That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet **[or distribute]** the water or the electric energy sold or given to it or him by the said grantee."

(The Decree of the District Court says nothing about distribution, R. 168.)

If "**or distribute**" is thus to be read into Section 6, claim will be later made for reading into the Section other language found in the Opinion, including quoted matter, with the result that the City might be later met with the claim that Section 6 should read, for instance, as follows:

> "That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet **[or distribute]** the water or the electric energy sold or given to it or him by the said grantee; **[and all development (construction) work must be performed by the grantee or a municipal agency] [competitive conditions must be maintained against private utility companies]** and **[water and electric energy must be sold at cost]**."

The idea that Section 6 required the Municipality to operate its own distributing system was rejected in the Opinion of Secretary Ickes as follows (R. 244:19-27):

Secretary Ickes' Opinion.

"The contention that Congress does not have power to compel the City and County of San Francisco to acquire and operate its own distributing system, **while true** (see Uhl v. Badaracco, 199 Cal. 270), is quite beside the point. We are not concerned here with a direct attempt to force municipal ownership and operation on the City and County of San Francisco by a mandatory Congressional enactment." (Boldface ours.) (Br. Res. pp. 168-169.)

Uhl (a taxpayer) v. Badaracco, et al. (Supervisors and Mayor of San Francisco), 199 Cal. 270, 280 (1926) (cited above in Secretary Ickes' Opinion) dealt with the authority of Congress as a law making power to enact the prohibitions of Section 6. The case arose after the contract here under review, i.e., that of July 1, 1925, between the City and the Company, had been in operation for more than one year; and involved the authority of the City to use the revenue collected under the contract to buy or build new power plants. The Court held that the City should apply the revenues from the Hetch Hetchy project (a) first to the payment of operating costs and (b) the balance to the service charges on the Hetch Hetchy bond issues. The defendants (Supervisors and Mayor of the City) argued that in view of the prohibitions of Section 6 of the Raker Act the City was entitled to use the revenues from the project to build publicly owned power plants. The Supreme Court of California held (p. 280):

". . . Congress has no power to create or force a public utility upon the City, and under the organic law of the City a public utility can be acquired only

in one of two ways: First, from funds derived from taxes levied for that purpose; second, from funds derived from the sale of bonds issued for such purpose."

It is therefore important in this Petition to review the Opinion of this Court in the hope that it may appear that the case can be reheard with profit; and failing that, that certain changes in the Opinion should be made to avoid misinterpretation of portions thereof (even by fanciful argumentation) and to change other portions which may have been due to inadvertence.

Under the rule, this Petition must be on file May 17, 1940, and the Mandate will issue on the following day unless the motion for a stay thereof, pending the disposition of this Petition, be granted. This would call for a shutting down of the power houses, say, not later than May 22nd, and heavy capital expenditures to by-pass the water.

GROUNDS OF THIS PETITION AND MOTION.

The grounds of this Petition and motion are:

First: The Court holds that Section 6 of the Raker Act is valid and plainly expresses its purpose. (p. 11, lines 19, 20 Opinion.) We ask the Court to reconsider its ruling (p. 3, line 20 to p. 7, line 7) that the "plain purpose" of the Act is to be ascertained, *not from its wholly unambiguous language,* but from the assertions of five out of ninety-six Senators and *seven* out of 435 members of the House of Representatives, made in Congressional debate. The language of the Senators had to do with the

general purpose of the Raker Act and not with respect to the meaning of Section 6, and the authoritative views of the House are those quoted in Brief for Respondent, pp. 61-63, not mentioned in the Opinion, and which serve to show that the views attributed in the Opinion to Representative Thomson of Illinois (p. 3 foot) have been misunderstood.

Second: If Congress intended by the enactment of the Raker Act to accomplish the purposes recited by the several citations from Congressional Debates set forth in pages 3-6 of the Court's opinion, the Court has mistakenly concluded that the Contract between respondent and Pacific Gas and Electric Company of July 1, 1925 *violates,* or is subversive of those purposes.

Third: Future disputes respecting the meaning of the Opinion (p. 3, line 17) will be obviated by clarification.

Fourth: In view of the signal failure of the Government to introduce into the record in this case any evidence whatever that the Pacific Gas and Electric Company either (1) exercises a monopolistic control of the supply of electric energy to the people of San Francisco, or (2) makes any profit out of the utilization of the public domain granted under the Raker Act, the order of this Court should not have been for an unqualified affirmance of the judgment of the District Court, but, at the most, for a reversal and a new trial, at which the Government may have opportunity to prove, if it can, and Respondent may have an opportunity to rebut the contentions, made in Government briefs and Arguments on certiorari with respect to the above points, not one of which points was supported either by pleading or proof in the District Court.

Fifth: The tragically disastrous consequences to the Respondent and its thousands of taxpayers that will inevitably flow from the unqualified affirmance of the District Court's decision, justify a stay of this Court's mandate.

ARGUMENT.

POINT 1. THE LANGUAGE OF SECTION 6 OF THE RAKER ACT IS PLAIN AND UNEQUIVOCAL AND NEEDS NO CITATION FROM CONGRESSIONAL DEBATES TO INTERPRET EITHER ITS MEANING OR PURPOSE.

Respondent pointed out at great length in its brief in this Court that, until the Petition for Certiorari was filed herein, there had *never* been any question in the mind of either the Respondent's officials or of Counsel for the United States or of any Secretary of the Interior charged with administration of the Raker Act (including Secretary Ickes), but that Section 6 prohibited a *sale for resale,* nothing further (Respondent's Brief pp. 1-109.) The language of the section speaks for itself, even though its intent may be strengthened by supplying an obvious ellipsis or referring to its historical setting. Respondent is not to "sell" to a private corporation the "right to sell" the energy "sold or given" to that corporation by Respondent. How can this be converted into a prohibition against "employing" a private corporation, or for that matter a private individual, to "transmit and distribute" the energy to consumers? Respondent, as a public corporation, can act only through officers, agents and employees. Why is there anything more objectionable in having its corporate functions performed for it and in its name by

corporate agents rather than by individual agents or employees? This question remains unanswered.

Why should it not be held that Congress in limiting its prohibition to a "sale" of the "right to sell," intended only to prevent that absolute transfer of control over the title price and terms of disposal of the energy that alone would remove the Respondent from sole control and enjoyment of the benefits of the grant? Why should it be held that this plain language had a hidden meaning of preventing San Francisco from *utilizing the only available, existing facilities for distribution of its energy,* and forcing it to discard these facilities and embark on distribution through a publicly owned system? Congress, had it seen fit, to do so, might have incorporated specifically such a mandate for a publicly owned *distribution system* in the Act. Congress, however, did not impose such a requirement and no justification appears for the Courts to supply a judicial enactment of the omitted language.

In *Wallace v. Cutten,* 298 U.S. 229 (1936) (cited supra) Mr. Justice Brandeis, affirming the judgment involved and speaking for a unanimous Court, said (pp. 236-237):

> "The Government argues that . . . the literal construction thus given (in the court below) to pp. 6 (b) renders it impractical and ineffective as a means of dealing with those persons who violate any of the provisions of the Act. . . .
>
> "It would be inappropriate for us to discuss these, and other arguments presented. The language of pp. 6 (b) is clear; and on the face of the statute, there can be no doubt concerning the intention of Congress. As was said (by us in another case) . . . 'The statute was evidently drawn with care. Its language is plain

and unambiguous. *What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably (possibly) by inadvertence, may be included within its scope. To supply omissions transcends the judicial function.'* ''

The prohibitions of Section 6 are not to be enlarged having regard to an assumed policy in the enactment of the statute, for the authorities are innumerable to show that such appeals are always in vain unless there are provisions of the statute to support them.

"We recognize the value of the rule of construing statutes with reference to the evil they were designed to suppress as an important aid in ascertaining the meaning of language in them which is ambiguous and equally susceptible of conflicting constructions. But this court has repeatedly held that this rule does not apply to instances which are not embraced in the language employed in the statute, or implied from a fair interpretation of its context, even though they may involve the same mischief which the statute was designed to suppress."

United States v. Chase, 135 U.S. 255, 261 (1890).

"What is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes."

Hadden v. Barney, 72 U.S. (5 Wall.) 107 (1866).

"I think there is always danger in giving effect to what is called the equity of a statute, and that it is

much safer and better to rely on and abide by the plain words, although the Legislature might possibly have provided for other cases had their attention been directed to them."

Lord Tenterden, C. J. in *Brandling v. Barrington*, 6 B. & C. 467, 108 Eng. Rep. 523, 527 (1827).

"I entirely agree with the view which has been taken of this question. This case does not appear to have been contemplated by the Legislature, although it may perhaps be within the mischief which they intended to remedy by the 8 Ann. c. 14."

Holroyd, J., same case (p. 527).

"The true way in these cases is to take the words as the Legislature has given them, and to take the meaning which the words given naturally imply, unless where the construction of those words is, either by the preamble or by the context of the words in question, controlled or altered; and, therefore, if any other meaning was intended than that which the words purport plainly to import, then let another Act supply that meaning and supply the defect in the previous Act."

Crawford v. Spooner (1846) VI Moore 1, 13 Eng. Rep. 582, 585.

The Opinion, page 4, footnote 10, cites three decisions to support its resort to Congressional debates. We think that these cases do not justify the use made of the Congressional debates in the Opinion.

The first of the three cases rests upon the decision of this Court in 166 U.S. 290, and it is necessary, in order to give a comprehensive idea of these authorities that quotation should first be made from 166 U.S. 290 and then from

the three cases cited in the Opinion. Accordingly, this course is followed.

United States v. Freight Association, 166 U.S. 290, 318-319.

"All that can be determined from the debates and reports is that various members had various views, and we are left to determine the meaning of this act, as we determine the meaning of other acts, from the language used therein.

There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. *United States v. Union Pacific Railroad Company*, 91 U.S. 72, 79; *Aldridge v. Williams*, 3 How. 9, 24, Taney, Chief Justice; *Mitchell v. Great Works Milling & Manufacturing Company*, 2 Story 648, 653; *Reg. v. Hertford College*, 3 Q.B.D. 693, 707.

The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed. (Cases cited, *supra*.)"

Standard Oil Co. v. United States, 221 U.S. 1, 50:

"Although debates may not be used as a means for interpreting a statute (United States v. Trans-Missouri Freight Association, 166 U.S. 318, 41 L. Ed. 1019, 17 Sup. Ct. Rep. 548, and cases cited) that rule in the nature of things is not violated by resorting to

debates as a means of ascertaining the environment at the time of the enactment of a particular law, that is, the history of the period when it was adopted."

Federal Trade Commission v. Raladam Co., 283 U.S. 643, 650:

"It is true, at least generally, that statements made in debate cannot be used as aids to the construction of a statute. But the fact that throughout the consideration of this legislation there was common agreement in the debate as to the great purpose of the act, may properly be considered in determining what that purpose was and what were the evils sought to be remedied. In Ho Ah Kow v. Nunan, 5 Sawy. 552 . . . Mr. Justice Field, speaking for himself and Judge Sawyer, said (p. 560): 'The statements of supervisors in debate on the passage of the ordinance cannot, it is true, be resorted to for the purpose of explaining the meaning of the terms used; but they can be resorted to for the purpose of ascertaining the general object of the legislation proposed, and the mischiefs sought to be remedied'."

Humphrey's Executor v. United States, 295 U.S. 602, 625:

"While the general rule precludes the use of these debates to explain the meaning of the words of the statute, they may be considered as reflecting light upon its general purposes and the evils which it sought to remedy. Federal Trade Comm'n v. Raladam Co., 283 U.S. 643, 650."

We respectfully submit that the Opinion goes far beyond these tried and tested rules of statutory construction and should be reviewed and modified.

POINT 2. NEITHER IN DESIGN NOR IN PERFORMANCE DOES THE CONTRACT OF JULY 1, 1925 VIOLATE ANY OF THE PURPOSES WHICH THE OPINION (pp. 3-6) ASCRIBES TO CONGRESS IN THE ENACTMENT OF THE RAKER ACT.

We ask the Court to again consider carefully the following facts, uncontradicted in the record:

1. Physical control of the electric energy is admittedly in the City's hands up to the time when it passes into the Pacific Gas and Electric Company's transmission lines at Newark thirty-five miles from San Francisco.

2. The acts of the Company's load dispatcher in throwing the switches in and out which control the actual physical delivery of the energy to consumers in San Francisco are themselves controlled by two factors: one, the consumer's demand which determines when and how much energy will be taken and consumed—(energy can only be transmitted when consumers are ready to take it); two, the obligations of the Company under its contract to take and deliver to San Francisco consumers *all* the City's energy, at the agreed deliverable load factor, diminished only by actually ascertained transmission losses (24%). If the City were distributing the energy through a municipally owned plant its delivery would be controlled by consumers' demands, not by its plant capacity if it exceeded such demand. The City is at all times in a position to enforce upon the Company compliance with its obligations to receive and deliver the energy to consumers. It therefore controls the physical delivery of the energy to the same extent that it would if it were handled through its own employees. *The element of control is there, in the City,* whether it be exercised through the authority of an employer over employees or of a principal over its agent.

3. The City *has prescribed* the rates to be charged consumers through clauses first and eighth of the con-

tract which provided that they must not exceed lawfully established rates, i.e. rates fixed by the State Railroad Commission. The City certainly had the power to say that the rates charged for its energy should not exceed Railroad Commission Schedules. Rate making is a complex business. If, having in mind the fact that its energy must be supplemented by the Company's energy in order to meet consumers' demand, and the fact that Company's energy under law must be sold at Railroad Commission rates, the City elected to adopt the same schedules for its own energy, this certainly was an exercise of price control. It would have been no broader legally if, instead of incorporating Commission schedules by reference it had set them forth in full in the contract. Reductions in rate schedules made by the Railroad Commission from time to time have been enjoyed by the consumers of the City's energy to the same extent as if the City had made the reductions itself. If the Company had failed to apply the reductions to that energy the City would have been at all times in a position to enforce the contractual obligation to make them applicable, just as much as if it ordered its own employees to put them into effect under public operation.

4. The one-day-cancellation clause in the Contract leaves the City in a position to enforce its rights thereunder or immediately to terminate the arrangement. This is an additional safeguard to its municipal control of operations under the contract.

5. There can be no monopoly where there is public control of price and potential competition in business.

"A monopoly of trade embraces two essential elements: (1) The acquisition of an exclusive right to,

> or the exclusive control of, that trade; and (2) the exclusion of all others from that right and control." *United States v. Trans-Missouri Freight Ass'n* (U. S.) 58 Fed. 58, 82, 7 C.C.A. 15, 24 L.R.A. 73.

It is true that the Pacific Gas and Electric Company owns all the power distribution facilities in San Francisco at the present time. But it does not have a monopoly, first, because its rates are subject to control of the State Railroad Commission, and second because the City itself always stands as a potential competitor. The City might, if its voters so decided, install a complete duplicate distribution system, although such a course entails physical and economic wastes not attractive to contemplate. The City may, when its voters so declare, carry out its oft recited intent to acquire and own the Company's distribution facilities. It has the power of eminent domain and can take them over if that course should become necessary. It is obvious that the City competes with the Company in the generation of power and that the threat of competition in distribution, coupled with power to compete when the electorate authorizes it, is sufficient to offset any fears of monopoly expressed in the quoted portion of Congressional debates.

6. There is no evidence or pleading in the Record here of either (a) high rates paid by consumers for Hetch-Hetchy energy under this contract, or (b), any profit made by private capital out of the utilization of the public domain. The Government is the plaintiff in this case. It neither alleged nor proved that rates charged consumers of electric energy in San Francisco are high, or

that they would be any lower under public ownership of distribution facilities. Indeed the record shows through the testimony of the Government's own witness (R. 287) that rates have been repeatedly reduced by the Railroad Commission, whose rate schedules must not be exceeded under the Contract. Neither did the Government allege or prove that the Pacific Gas and Electric Company makes any profit whatever out of the utilization of the public domain by the City. On the contrary, the evidence shows without contradiction (R. 435) that the Company's retained percentage of revenues collected was calculated entirely on the basis of allowing actual operating and maintenance charges, taxes, depreciation, and a reasonable return on the Company's own capital *invested in the distribution and stand-by plant* used in the City's service. Such profit as exists from utilization of the granted lands is therefore clearly included in the City's share of the revenue, and the desires of Congress, as expressed in the quoted portions of debates to that end, have been fully satisfied. A suggestion was made at the argument of this case by counsel for the Government that a certain document—not in the record—which was handed this Court discloses that a larger profit could be made by the City under municipal operation. We desire to note that the claim amounts to just this—that if the City invested over fifty million dollars more in a municipally owned distribution system and operated it, it might expect to make a return on that capital at then existing rates. The report does *not* prove that the City would make one cent more profit out of the utilization of the public domain or that rates to consumers would be one mill lower.

POINT 3. FUTURE DISPUTES RESPECTING THE MEANING OF THE OPINION WILL BE OBVIATED BY CLASSIFICATION.

The disputes which we have in mind may arise out of the two following matters:

First.

The only question upon which Certiorari was asked was whether Section 6 (a) forbade sale of energy for resale or (b) forbade the sale of the right to sell. This was the only question respecting the interpretation of Section 6 which was submitted for decision. The Court has held that interpretation (b) is the correct one, and the Respondent submits that was all that the Court decided respecting the meaning of Section 6.

In arriving at its conclusion and in supporting it, the Court uses language arguendo which the Government interprets to involve additions to the scope of Section 6 which the Respondent thinks the Court never intended.

This is shown by the letter, May 6, 1940, from The Secretary of the Interior to The Mayor of San Francisco, supra, pp. 3-4, which involves the idea that language in the Opinion, including quoted matter, respecting the general purpose and object of the Raker Act, is to be carried into Section 6 and thereby enlarge the prohibitions thereof. The authorities which we cite, supra pp. 9 to 13, show that this should not be done.

Second.

Section 6, in full, reads as follows:

> "That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by

> the said grantee: Provided, that the rights hereby granted shall not be sold, assigned, or transferred to any private person, corporation, or association, and in case of any attempt to so sell, assign, transfer or convey, this grant shall revert to the Government of the United States."

The Government said in the Circuit Court of Appeals "The second clause of Section 6, stated in the form of a proviso, plainly *does not relate to the same subject matter as,* or restrain, modify, or otherwise affect, *the first clause.* The word 'Provided' has no significance here, simply serving to separate or distinguish the two clauses". (Govt. Supp. Br. CCA, p. 18, line 30 to p. 19, line 3, quoted in frontispiece to Add. Br. for Respondent in Opp. to Certiorari.)

In the Opinion (p. 3, lines 14-19) it is said:

> "The 'right to sell or sublet the . . . electric energy' so generated by the City cannot, as a consequence of Section 6, be sold or let. And in case of any attempt to 'sell, assign, transfer, or convey [the rights granted], this grant shall revert to the government of the United States'."

The connection of these two sentences in the Opinion may give occasion to an argument (no matter how unsound) that the City **has sold** the "right to sell or sublet the . . . electric energy", and hence the Hetch Hetchy grant has reverted to the Government of the United States.

We feel confident that no such idea was in the mind of the author of the Opinion when writing it, nor in the Court in adopting it; and if so, the fact should be indicated in some appropriate way.

Congress did not grant San Francisco the "right to sell water or electric energy". It granted certain lands and rights in the public domain as sites for and aids to the construction and operation of a municipal water supply and hydro-electric power system. It is these rights which are forbidden to be sold under penalty of forfeiture by the second sentence of Section 6. Confusion in the public mind may be caused by combining this sentence with the first and we respectfully submit that it is unnecessary and should be deleted.

On the other hand, if the Opinion was designed to hold that the proviso of Section 6 does relate to the first clause (contrary to the position of the Government stated above), the Respondent submits that there should be opportunity for re-argument on this point, at least, as it never had an opportunity to deal with this construction as one existing in the case in view of the above concession of the Government. Moreover, there was no challenge of what we said on this point (Br. Res. pp. 32-35), and there is nothing within the ambit of the Decree of the District Court (R. 168-170), which called upon the Respondent to argue the point.

POINT 4. AS A RESULT OF THE STATE OF THE RECORD UNDER POINT 2, THIS COURT SHOULD NOT HAVE AFFIRMED THE DISTRICT COURT'S DECISION WITHOUT MODIFICATION, BUT, IF IT BELIEVED THAT SOME MERIT MAY EXIST IN POINTS MADE BY THE GOVERNMENT FOR THE FIRST TIME ON APPEAL, WHICH ARE UNSUPPORTED BY THE RECORD, AT THE MOST A REVERSAL AND ORDER FOR NEW TRIAL SHOULD HAVE BEEN THE ORDER IN ORDER TO AFFORD BOTH PARTIES AN OPPORTUNITY TO PRESENT EVIDENCE.

The language of the Act prohibits sale for resale and had always been so construed—by Secretary Ickes and

everybody else, including the District Court. (R. 120.) The Contract under review by its express terms is *not* a contract of sale for resale. Now, if there should be any provision of the contract, or any detail of its execution, which causes this Court to feel that some unexpressed intent of Congress is being violated notwithstanding this fact, then, we respectfully submit the decision of the District Court should either be reversed and a new trial ordered in the light of this Court's interpretation, or else the order should be for such a modification of the judgment below as will permit a marketing arrangement to be agreed upon which will not conflict with said Congressional intent as interpreted by this Court. Unless this is done, the District Court may feel itself bound by the mandate herein to forbid any type of marketing arrangement, pending acquisition of a publicly owned system and a tremendous waste of potential electric energy and taxpayer's money will ensue—all without benefit to anyone.

POINT 5. WE ASK THAT THE MANDATE BE STAYED.

Unless the mandate herein is stayed, remittitur will issue of course on May 17th, 1940. The consequences of this decision are of tremendous importance to the three-quarters of a million inhabitants of San Francisco. It is obvious that the City cannot forthwith commence public distribution of power or, without some allowance of time, negotiate a new contract with the Power Company which may overcome the objections of the Court and Secretary of the Interior. The City has believed and contended in good faith that its existing agreement was valid. It was given support in this belief by the decision

of the Circuit Court of Appeal for the Ninth Circuit reviewed herein. It will lose a revenue of $2,200,000 per year which will necessitate adding 22¢ per $100 to the tax burden of its residents if the injunction granted below goes into force. In addition, it will face a large investment, for which no provision has been made, to by-pass its municipal water supply around the Moccasin Power Plant. This water is absolutely essential to the very lives of its inhabitants.

Under these circumstances, we urge upon the Court a careful review of the situation and facts set forth in this petition and earnestly ask for a stay of mandate. Further, if the Court feels that reargument would be of any assistance in this review, counsel for Respondent will be available for its presentation at the Court's convenience.

Dated, May 14, 1940.

Respectfully submitted,

JOHN J. O'TOOLE,
City Attorney
DION R. HOLM,
Assistant City Attorney
ROBERT M. SEARLS,
Special Counsel
GARRET W. MCENERNEY,
Of Counsel
Counsel for Respondent.

COUNSEL'S CERTIFICATE.

We hereby certify that the foregoing Petition is presented in good faith and without intent to hinder or delay the progress of the above entitled proceeding.

Dated, May 14, 1940.

JOHN J. O'TOOLE,
City Attorney
DION R. HOLM,
Assistant City Attorney
ROBERT M. SEARLS,
Special Counsel
GARRET W. MCENERNEY,
Of Counsel
Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES.

No. 587.—October Term, 1939.

United States of America, Petitioner; vs. City and County of San Francisco, a Municipal Corporation. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[April 22, 1940.]

Mr. Justice Black delivered the opinion of the Court.

By the Raker Act of December 19, 1913,[1] Congress granted the City and County of San Francisco,[2] subject to express conditions, certain lands and rights-of-way in the public domain in Yosemite and Stanislaus National ~~Parks~~ Forest. The Act in terms declared that this, known as the "Hetch-Hetchy" grant, was intended for use by the City both in constructing and maintaining a means of supplying water for the domestic purposes of the City and other public bodies, and in establishing a system "for generation and sale and distribution of electric energy."

Upon application of the Secretary of the Interior, the United States brought this suit[3] in equity charging the city with disposing of power through the Pacific Gas & Electric Company, a private utility, in violation of Section 6 of the granting Act. Section 6 provides "That the grantee [the City] is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the grantee: Provided, That the rights hereby granted shall not

[1] c. 4, 38 Stat. 242.

[2] The City and County of San Francisco is a municipal corporation of California and will be referred to here as the City.

[3] Section 9(u) of the Act contains the following: "*Provided, however,* That the grantee shall at all times comply with and observe on its part all the conditions specified in this Act, and in the event that the same are not reasonably complied with and carried out by the grantee, upon written request of the Secretary of the Interior, it is made the duty of the Attorney General in the name of the United States to commence all necessary suits or proceedings in the proper court having jurisdiction thereof, for the purpose of enforcing and carrying out the provisions of this Act." 38 Stat. 250.

be sold, assigned, or transferred to any private person, corporation, or association, and in case of any attempt to so sell, assign, transfer, or convey, this grant shall revert to the Government of the United States."

The District Court concluded that the City was violating Section 6 by the sale and distribution of Hetch-Hetchy power through the Pacific Gas & Electric Company, a private utility. Accordingly, the City was required by injunction alternatively to discontinue such disposal of the power or cease further use of the lands and rights granted it under the Act for generation and transmission of electric energy.[4] The Circuit Court of Appeals reversed,[5] finding that the private utility was merely acting as the City's agent in the sale and distribution of Hetch-Hetchy power and holding that Section 6 does not prohibit such sale and distribution of that power by a private utility.

Here, as in the courts below, the City has defended the sale and distribution by Pacific Gas & Electric Company of power originating at Hetch-Hetchy upon the grounds that such disposition does not violate the prohibitions of Section 6; that imposition of these prohibitions was not within the constitutional authority of Congress; and that if Section 6 is [redacted] and has been violated, the United States is not entitled to injunctive relief in equity.

First. Prohibitions of Section 6. In the City's view, Section 6 does not preclude private utilities from all participation in the ultimate sale and distribution of Hetch-Hetchy power. The City insists that the Section, so construed, does no more than prohibit the City from selling Hetch-Hetchy power to a private utility for resale to consumers and therefore permits consignment of the power to the Company, as agent of the City, for sale and distribution. On the contrary, the Government's position rests upon the claim that Pacific Gas & Electric Company is not in reality selling and distributing Hetch-Hetchy power as consignee and agent but as purchaser for resale; that the grant to the City was made upon the mandatory condition that this power be sold solely and exclusively by the City directly to consumers and without private profit in

[4] 23 F. Supp. 40. The District Court stated: "In order that the City may face its problem and comply with its obligations under Section 6 of the Raker Act, the Court will make its injunction issuable forthwith, but effective six months from the date of its issue". p. 53.

[5] 106 F. (2d) 569.

order to bring it into direct competition with adjacent privately owned utilities; and that Section 6 not only withholds the right of selling for resale but also prohibits the City "from ever selling or letting" to any private corporation "the right to sell or sublet the . . . electric energy sold or given to it . . . by the City." The language of the Act, its background and its history require the construction given Section 6 by the Government.

From its provisions,[6] it is apparent that the Act conditions the grant upon and contemplates the development, sale and distribution of electrical power by the City itself "for municipal and commercial use" on a scale to be gradually stepped up over a period of years. "The . . . grantee shall develop and use hydroelectric power for the use of its people and shall . . . sell or supply such power for irrigation, pumping, or other beneficial use." The "right to sell or sublet the . . . electric energy" so generated by the City cannot, as a consequence of Section 6, be sold or let. And in case of any attempt to "sell, assign, transfer, or convey [the rights granted], this grant shall revert to the government of the United States."

From the statement of the Congressman responsible for the application of the prohibitions of Section 6 specifically to electric energy,[7] it is clear that as enacted Section 6 was understood to prohibit the City from transferring to a private utility the right to sell Hetch-Hetchy power (the Government's contention) and not merely to forbid sale of power as a commodity for resale, as the City would have us hold:

"Mr. TAYLOR of Colorado. We have got to let the municipality sell to individuals or consumers.

"Mr. THOMSON of Illinois. Yes; but not the right to sell some one else the power.

"Mr. TAYLOR of Colorado. Supposing that San Francisco sells a certain block, you may say, of its power to Alameda. Has not Alameda got the right to resell that to its inhabitants?

"Mr. THOMSON of Illinois. Mr. Chairman, in answering the question of the gentleman from Colorado, I would like to call his attention to the fact that the subject of sale as printed in this section is not the power or the water, but the right to sell the power or the water.

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[6] See Section 9(m).

[7] 50 Cong. Rec., Part 4, p. 4906. Mr. Thomson of Illinois was a member of the committee that considered and reported the Bill.

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"Mr. RAKER. That [the word "individual"] really is intended to cover any person who might attempt to buy this electric power or right. I think it would cover everybody outside of a corporation, the intention being to prevent anybody getting in and getting a right and sub-letting it."[8]

In its Report on the Bill, the House Committee on Public Lands stated that the provision of Section 6 "acquiesced in by the grantee, was designed to prevent any monopoly or private corporation from hereafter obtaining control of the water supply of San Francisco."[9]

From the congressional debates on the passage of the Raker Act can be read a common understanding both on the part of sponsors of the Bill and its opponents that the grant was to be so conditioned as to require municipal performance of the function of supplying Hetch-Hetchy water and electric power directly to the ultimate consumers, and to prohibit sale or distribution of that power and water by any private corporation or individual.[10] On the floor of the House, the following took place between the Bill's author and other Representatives:

"Mr. SUMNERS. Does San Francisco own its own lighting plant now?

"Mr. KAHN. No; it does not.

"Mr. RAKER. I understand it does not.

"Mr. KAHN. It does not own its own water supply. Its present water supply is furnished by a private company.

"Mr. RAKER. The Spring Valley Water System.

"Mr. SUMNERS. Is it the purpose of this bill to have San Francisco supply electric power and water to its own people?

"Mr. RAKER. Yes.

"Mr. SUMNERS. Or to supply these corporations, which will in turn supply the people?

"Mr. RAKER. Under this bill it is to supply its own inhabitants first. . . ."[11]

These views were in accord with the recommendation of the then Secretary of the Interior, as set out in the Report of the Public Lands Committee of the House:

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[8] *Id.*, p. 3999.

[9] H. R. No. 41, 63rd Cong., 1st Sess., p. 11.

[10] Reference to congressional debates may be made to establish a common agreement upon the general purpose of an Act. Standard Oil Co. v. United States, 221 U. S. 1, 50; Federal Trade Commission v. Raladam Co., 283 U. S. 643, 650; Humphrey's Executor v. United States, 295 U. S. 602, 625.

[11] 50 Cong. Rec., Part 4, p. 3905.

"I think that it is very proper that the Federal Government should use whatever power it has over the public lands, over the parks, and over the forests, to compel the fullest use of these waters, and indirectly to require through its power to make conditions, the lowest possible rate for consumers."[12]

The theme—of an intent to require public utilization of Hetch-Hetchy power independently of private utilities—recurred at a later stage of the debate in the House:

"Mr. GRAY. . . .

"As I understand the bill, it provides for the furnishing of water, and also for power for commercial use. . . .

" . . . if these works here are to be constructed to serve the baseness of commercialism, it is the vilest of all vandalism. My suggestion here to you is to strike out of this bill all the commercial profit. . . .

"Mr. KENT. [a Member of the California delegation and a supporter of the measure] Mr. Chairman, I should like to suggest to the gentleman from Indiana [Mr. GRAY] that this bill is strictly drawn in the public interest, that there is no possibility of selfish gain, and that no corporation or individual can obtain any benefit whatsoever from this bill. It is for the benefit of the people of California."[13]

In the Senate, Senator Thomas, a Member of the Committee reporting the Bill, said:

" . . . San Francisco needs electric power, and California needs development in electric power just as much as she needs ownership in water, . . .

" . . . She is anxious to extend her spheres of municipal usefulness, but she is in the grip of a power monopoly as well as that of the Spring Valley Co.

" . . . This scheme appeals to me, Mr. President, so far as the power is concerned, because the city of San Francisco as a municipality will be the owner of it, the manufacturer, the distributer of it."[14]

And the words of Senator Norris, also a Member of the reporting Committee and a leading sponsor of the bill, on the day of its final passage through the Senate, illuminate just what the Raker Act was intended to accomplish:

" . . . I said that I was in favor of this bill to a great extent for the reason that it developed this power. This power will come in to

[12] House Reports, Vol. 1, Nos. 17-92, 63rd Cong., 1st Sess., 1913, p. 25.

[13] 50 Cong. Rec., Part 4, p. 3991. See also 69 Cong. Rec., Part 9, pp. 9239 *et seq.*

[14] 51 Cong. Rec., Part I, pp. 126, 136.

competition with the various water-power companies of California, and there are lots of them there.

" . . . this proposition is to harness that power and to put it to public use not to give it to a private corporation. . . .

"Here is an instance where we are going to give it directly to the people, if we pass this bill. It is going to come into competition with power companies and corporations that have, or will have, if this bill is defeated, almost a monopoly not only in San Francisco but throughout the greater portion of California.

" . . .

"These make in all, as I have counted them, 18 corporations controlling the power in the vicinity of San Francisco that are under the control of this one corporation. [Pacific Gas & Electric Company.]

" . . . When you sum them all up you will find that they own practically all of the hydroelectric power of the State of California, and this bill, if passed, will bring into competition with them one of the greatest units for the development of power that has ever been developed in the history of the world. It means competition.

" . . . Conservation does not mean dealing out these resources to private capital for gain. It is not necessary to accuse those corporations of doing any wrong; but here will be an instance where the cheapest power on earth will be developed and where it will be sold at cost."[15]

Opponents of the bill themselves recognized that its regulatory conditi ns were designed to insure distribution of power from Hetch-Hetchy through a municipal system in San Francisco. Before final passage in the Senate, opposition had practically narrowed down to the power provisions of the measure,[16] and these provisions contemplated a publicly owned and operated power sys-

[15] 51 Cong. Rec., Part 1, pp. 343, 344, 347. Senator Pittman, one of the Bill's sponsors and a Member of the reporting Committee, stated that the Bill provided "absolutely that neither this water nor this power can ever fall into the hands of a monopoly." 50 Cong. Rec., Part 6, p. 5473.

[16] See, e. g., views of Senator Smoot, who opposed the measure: " . . . I was opposed to the regulations that were put in this bill, and that is what I was opposed to more than any other thing. I wanted the question of regulations taken out of the controversy and the bill reported to the Senate without those regulations in it.

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"Mr. President, I do not think there ought to be any misunderstanding about this matter. The Senator himself, I think, will admit that the principal object of this bill is to provide for the creation of power. . . . "

" . . . I will, moreover, say that it is my opinion that the reason San Francisco wants this particular dam site is for the power that she thinks can

tem.[17] Immediately before the vote in the Senate, Senator McCumber, opposed to the power provisions of Section 6, offered a sweeping amendment which would have omitted that Section and all other provisions relating to the generation, sale and distribution of Hetch-Hetchy power.[18] But his amendment was defeated.[19] And despite this articulate opposition to the policy embodied in its power features, the Act was passed.

To limit the prohibitions of Section 6 of the Act narrowly to sales of power for resale without more, as the City asks, would permit evasion and frustration of the purpose of the lawmakers. Congress clearly intended to require—as a condition of its grant—sale and distribution of Hetch-Hetchy power exclusively by San Francisco and municipal agencies directly to consumers in the belief that consumers would thus be afforded power at cheap rates in competition with private power companies, particularly Pacific Gas & Electric Company. It is not the office of the courts to pass upon the justification for that belief or the efficacy of the measures chosen for putting it into effect. Selection of the emphatically expressed purpose embodied in this Act was the appropriate business of the legislative body.

The admitted facts shown by this record required the District Court to find—as it did—that the City was violating Section 6 in permitting sale and distribution of Hetch-Hetchy power by the Pacific Gas & Electric Company. Now, as it has been doing since contracting with the City in 1925, the Company sells and distributes that power as follows:

"Power generated in the City's plant is transmitted to the Company at Newark, about thirty-five miles from San Francisco. There

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be developed cheaper than from any other source, and at the same time get a large supply of water. That is my personal opinion." 51 Cong. Rec., Part 1, pp. 304, 314, 360.

17 "The people who ride on street-cars, the people who use electric lights, the people who are now using gas, those who eventually will use coal for purposes of heat, and those who use water for washing purposes will all receive all the benefit there is in this legislation without any rake-off by any corporation or monopoly." Senator Norris, 51 Cong. Rec., Part 1, p. 347.

18 Senator Clark, of Montana, also opposed to the power provision of the Bill, said with reference to Senator McCumber's amendment: " . . . The Senator from North Dakota [Mr. McCumber] has prepared an amendment to the bill which accomplishes all the purposes which the proponents of the bill claim are desired, leaving out the objectional features, which have nothing whatever to do with the water supply of the city of San Francisco." 51 Cong. Rec., Part 1, p. 184.

19 *Id.*, pp. 383, 384, 385.

the power is delivered to the Company's sub-station and thereafter is under the Company's complete control. The Company distributes and sells this power to its customers in San Francisco and elsewhere exactly as it handles other power which it generates, buys or owns. Consumers of the power are billed by and pay the Company. The City buys Hetch-Hetchy power from the Company exactly as do other consumers. The City receives monthly payments from the Company on a fixed basis set out in the contract. The price received by the City has remained constant from 1925 to date although rates to the consumers have varied in the interim. In the event of the refusal, failure or inability of the Company to take the available output of the City's plant in accordance with the agreement, the amount of energy which the City could have delivered is the basis of making the monthly payment, and the Company must pay for power delivered to it whether actually disposed of by resale or not. The rate paid by consumers for the Hetch-Hetchy power is not fixed by the City, as it could be under the Constitution of California,[20] but is fixed by the State Railroad Commission just as the price of all other power sold by the Pacific Gas & Electric Company in California is fixed.

Thus, in brief, the City does not itself distribute and sell the power directly to consumers; it has not provided competition with the private power company; and it has transferred the right to sell and distribute the power to a private power company in violation of the express prohibition of Section 6 of the Act.

Terminology of consignment of power, rather than of transfer by sale, and verbal description of the power Company as the City's agent or consignee, are not sufficient to take the actions of the parties under the contract out of Section 6. Congress, in effect trustee of public lands for all the people, has by this Act sought to protect and control the disposition of a section of the public domain. The City has in fact followed a course of conduct which Congress, by Section 6, has forbidden. Mere words and ingenuity of contractual expression, whatever their effect between the parties, cannot by description make permissible a course of conduct forbidden by law. When we look behind the word description of the arrangement between the City and the power company to what was actually done, we see that the City has—contrary to the terms of Section 6—abdicated its control over the sale and ultimate distribution of Hetch-Hetchy

[20] Under Art. XII, Sec. 23 of the California Constitution municipalities are exempt from rate regulation by the State Commission. See Pasadena *v.* R. Comm., 183 Cal. 526; Water Users, etc. *v.* R. Comm., 188 Cal. 437.

power. There remain only the determinations whether the prohibitions of Section 6 are constitutional and can be enforced in equity.

Second. The prohibitions of Section 6 are challenged by the City as an unconstitutional invasion of the rights of the State of California on the ground that they attempt to regulate the manner in which electricity shall be disposed of in San Francisco. And the City therefore insists that these prohibitions must be considered only as covenants in a contract between the City and the United States. Upon this premise, the City has argued here, as it did in the Court of Appeals, that alleged equitable defenses render the covenants unenforceable.

When the Raker Bill was before Congress, the City filed with the Public Lands Committee of the House a brief and argument in support of the Bill. Citing authorites, including this Court's opinions, and legislative precedents, the City submitted to Congress that as grantee it would be bound by and as grantor Congress was empowered to impose "the conditions set forth in the Hetch-Hetchy bill."[21] After passage of the Bill the City accepted the grant by formal ordinance, assented to all the conditions contained in the grant, constructed the required power and water facilities and up to date has utilized the rights, privileges and benefits granted by Congress. Now, the City seeks to retain the benefits of the Act while attacking the constitutionality of one of its important conditions.[22]

Article 4, Section 3, Cl. 2 of the Constitution provides that "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States." The power over the public land thus entrusted to Congress is without limitations.[23] "And it is not for the courts to say how that trust shall be administered. That is for

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21 H. R. No. 41, 63rd Cong., 1st Sess., p. 41. Similar views were entertained in Congress upon the effect of the conditions. See, e. g., Senator Walsh of Montana: "We are making a grant of rights in the public lands to the city of San Francisco, and we may impose just exactly such conditions as we see fit, and San Francisco can take the grant with all those conditions or it can let it alone." 51 Cong. Rec., Part 1, p. 69.

22 Cf. Daniels v. Tearney, 102 U. S. 415, 421; Grand Rapids & Indiana Ry. Co. v. Osborn, 193 U. S. 17, 29; Wall v. Parrott Silver & Copper Co., 244 U. S. 407, 411; St. Louis Co. v. Prendergast Co., 260 U. S. 469, 473; Booth Fisheries v. Industrial Commission, 271 U. S. 208, 211.

23 United States v. Gratiot, 14 Pet. 526, 527.

Congress to determine."[24] Thus, Congress may constitutionally limit the disposition of the public domain to a manner consistent with its views of public policy. And the policy to govern disposal of rights to develop hydroelectric power in such public lands may, if Congress chooses, be one designed to avoid monopoly and to bring about a wide-spread distribution of benefits. The statutory requirement that Hetch-Hetchy power be publicly distributed does not represent an exercise of a general control over public policy in a State but instead only an exercise of the complete power which Congress has over particular public property entrusted to it.[25]

Third. Finally, on the basis of numerous objections to the District Court's judgment, assigned as errors in the Court below and pressed here, the City denies the Government's right—upon a balancing of equities—to relief by injunction even if the present disposition of Hetch-Hetchy power be in violation of the Act.

However, after consideration of all these objections, we are satisfied that this case does not call for a balancing of equities or for the invocation of the generalities of judicial maxims in order to determine whether an injunction should have issued. The City is availing itself of valuable rights and privileges granted by the Government and yet persists in violating the very conditions upon which those benefits were granted. Congress provided "That the grantee [City] shall at all times comply with and observe on its part all the conditions specified in this Act and in the event that the same are not reasonably complied with and carried out by the grantee, upon written request of the Secretary of the Interior it is made the duty of the Attorney General in the name of the United States to commence all necessary suits or proceedings in the proper court having jurisdiction thereof, for the purpose of enforcing and carrying out the provisions of this Act." Pursuant to this legislative mandate, the present suit was instituted to enforce covenants exacted from a grantee of rights in the public domain by a Congress sympathetic with the local needs of San Francisco but also jealous of its own responsibility to dispose of such rights in a manner deemed by it most likely to render their benefits widespread. The equitable doctrines relied on do not militate against the capacity of a court of equity as a proper forum in which to make a declared

[24] Light v. United States, 220 U. S. 523, 537.

[25] Cf. Ellis v. United States, 206 U. S. 246, 256; see Ruddy v. Rossi, 248 U. S. 104.

policy of Congress effective. Injunction to prohibit continued use—in violation of that policy—of property granted by the United States, and to enforce the grantee's covenants, is both appropriate and necessary.[26]

A substantial part of the City's argument rests upon its claim that the Department of the Interior in the period from 1913 to 1937 construed Section 6 to forbid no more than sale of power for resale. We are asked to accept these administrative interpretations. And in addition the City suggests that conduct of the Department, of which these interpretations were a part, is sufficient to create an estoppel against the Government. Whether the Department at any time ever did more than merely to tolerate sale and distribution of Hetch-Hetchy power by the Company as a temporary expedient is doubtful. Certain it is, however, that in 1935 the Secretary of the Interior declared the City's disposition of the power through the Company to be a violation of Section 6, demanded discontinuance of this violation without success and thereafter instigated this proceeding. We cannot accept the contention that administrative rulings—such as those here relied on—can thwart the plain purpose of a valid law. As to estoppel, it is enough to repeat that, "... the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit."[27]

The judgment of the Circuit Court is reversed. The judgment of the District Court is affirmed and we remand the case to it.

It is so ordered.

Mr. Justice McREYNOLDS is of the opinion that the judgment of the Circuit Court of Appeals should be affirmed.

Test:

A true copy.

Clerk, Supreme Court, U. S.

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[26] Cf. Oregon & Cal. R. R. *v.* United States, 238 U. S. 393, 436, 438.

[27] Utah Power & Light Co. *v.* United States, 243 U. S. 389, 409.